

December 4, 2000

COMMISSION VOTING RECORD

DECISION ITEM: SECY-00-0159
TITLE: FINAL RULE AMENDING THE FITNESS-FOR-DUTY RULE

The Commission (with Chairman Meserve and Commissioners Dicus, McGaffigan, and Merrifield agreeing) approved the subject paper as noted in the Affirmation Session and recorded in the Affirmation Session Staff Requirements Memorandum (SRM) of December 4, 2000. Commissioner Diaz approved in part and disapproved in part.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

Annette Vietti-Cook
Secretary of the Commission

Attachments: 1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Meserve
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield
OGC
EDO
PDR

VOTING SUMMARY - SECY-00-0159

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. MESERVE	X				X	10/26/00
COMR. DICUS	X				X	11/21/00
COMR. DIAZ	X				X	11/28/00
COMR. MCGAFFIGAN	X				X	8/23/00
COMR. MERRIFIELD	X				X	11/20/00

COMMENT RESOLUTION

In their vote sheets, Chairman Meserve and Commissioners Dicus, McGaffigan, and Merrifield approved the staff's recommendation and provided some additional comments. Commissioner Diaz approved in part and disapproved in part. Commissioner Diaz disapproved, in part, because he did not believe the "worthwhile" changes passed the backfit test. Subsequently, the Commission affirmed the final rule as reflected in the Affirmation Session SRM issued on December 4, 2000.

Commissioner Comments on SECY-00-0159

Chairman Meserve

I join in comments 1, 2, and 4 submitted by Commissioner McGaffigan. In addition, Attachment F, "Analysis of the Application of the Backfit Rule to the Revisions to the Fitness-For-Duty Rule ([10 CFR Part 26](#))", should be revised to include clarification

that the Attachment does not constitute the entirety of the backfit analysis on which this rulemaking is based. The first paragraph of the Attachment should begin with the following:

This paper presents the staff's analysis of the application of the NRC's Backfit Rule (10 CFR 50.109) to each individual revision to the Fitness-for-Duty rule (10 CFR Part 26). As explained in the Federal Register notice associated with this rulemaking, the Commission also performed and relied upon a backfit analysis considering all the changes in the aggregate. Thus, this paper provides only part of the backfit analysis upon which this rulemaking is based.

In publishing the proposed revisions.....

Commissioner Dicus

I agree with the Chairman's changes to Attachment F and Commissioner McGaffigan's comments 1, 2, and 4.

Commissioner Diaz

I am strongly committed to the maintenance of a nuclear power plant workforce that is free of drugs and the influence of other substances that adversely affect the ability of personnel to safely and competently perform their duties. Thus, I find it pertinent that the effectiveness of the current regulatory program is not under any serious challenge; had it been otherwise, I would have voted differently. I also recognize the hard work of the staff and its struggle to finalize revisions to our fitness-for-duty regulations. As I observed in my comments on SECY-99-279, however, I am concerned that the long period since the agency obtained comments on the proposed rule may justify additional public airing of the proposed changes before final disposition. I also continue to be concerned by the clear difficulties in identifying the real safety need for new or increased requirements and in making a related "backfit" finding of a substantial increase in safety that justifies the direct and indirect costs of implementation. Under these circumstances, I approve only the proposed rule changes that the staff can identify as permissible reductions in burden consistent with the maintenance of public health and safety. In particular, I do not approve new and increased requirements that are justified by aggregation of estimated benefits and costs of all changes whether they are closely related or not.

Commissioner McGaffigan

I vote to approve the final rule package, publication of the Federal Register notice, and the associated determinations noted in SECY-00-159, subject to the comments noted below:

- 1) FR notice Page 63, paragraph "(4)", line 5 should read " . . ."Analysis of the Application ~~of to~~ the Backfit . . .";
- 2) FR notice Page 68, first complete paragraph, line 4: refers to "eight" factors in §50.109(c) "as follows", but then lists nine; and
- 3) FR notice Page 73, Footnote 8, delete second sentence and substitute:

In the future, the Commission will conduct an aggregate analysis of an entire rulemaking, unless there is a reasonable indication that: (i) a proposed change (as defined in footnote 1 above) is not reasonably related to the unified regulatory purpose of the rulemaking, and (ii) the proposed change imposes costs disproportionate to the safety benefit attributable to that change. In such cases, the Commission will perform an analysis of that proposed change in addition to the aggregate analysis of the entire rulemaking.

- 4) Attachment F, "Analysis of the Application of the Backfit Rule to the Revisions to the Fitness for Duty Rule" should be amended appropriately to reflect the fact that the final rule does not adopt the more restrictive temperature range in sections 2.4(g)(13) and (15) and the requirement for a medical determination of fitness for employees who are tested for cause and test negative.

Commissioner Merrifield

I **approve** the staff's recommendations outlined in SECY-00-0159. I know there are differing opinions among our stakeholders and our staff as to the merits of this final rule. The long and very difficult history associated with this rulemaking effort only adds to the contention surrounding it. I believe the Commission and the staff share responsibility for this history, and believe there are lessons we should apply to future rulemaking initiatives. In light of its legacy, I very carefully weighed the pros and cons of the final rule, considering the various views expressed by our stakeholders and our staff. This assessment led me to the conclusion that approving the final rule was the best course of action. Overall, the final rule will reduce unnecessary regulatory burden and improve program effectiveness and efficiency. There are many justified and important relaxations of requirements, and the cost savings of the entire package appear to far outweigh the costs to be expended as a result of the rulemaking. There are also worthwhile changes that should serve to further our confidence that the nuclear power plant workplace is drug and alcohol free.

I am pleased that the two requirements proposed by the staff in SECY-99-279 associated with (1) a more restrictive temperature range for an acceptable urine specimen and (2) medical determinations to evaluate all employees tested for

cause, have been removed from the final rule presented in SECY-00-0159. As I stated in my vote on SECY-99-279, I believe the staff lacked sufficient justification to impose these requirements, and going forward without such justification simply represented poor public policy. I hope that the staff reflects on the Commission's decision on these two matters so that similar mistakes are not repeated in future rulemaking packages.

Several of my Commission colleagues expressed their views on the backfit issue, and given its importance, I am compelled to reiterate the views I expressed in my vote on SECY-99-279. As we have learned throughout this rulemaking process, while aggregating a substantial number of changes may skew a backfit analysis, dis-aggregating changes to a single rule also creates analytical problems. In short, the goal of dis-aggregating is to separate the wheat from the chaff. However, it is necessarily true that each time a larger change is broken down and analyzed only on a component basis, the total increase in safety from the larger change is lost. In other words, estimating the increase to safety on a component-by-component basis may never yield a "substantial increase" because each component may contribute only a small amount toward safety. This may be true even if together the various changes may more than satisfy the substantial increase test. Similarly, a component-by-component analysis distorts the cost picture, because it attributes only minor or negligible costs to each component and fails to show the overall cost of a larger change.

I want to emphasize that I recognize that the backfit rule provides an important measure of discipline to the process of imposing new regulatory requirements. It provides a meaningful threshold against promulgation of requirements which do not clearly further the NRC's mission of protecting public health and safety. At bottom, its aim is consistent with the Commission's efforts to become more risk informed and to avoid having our licensees divert resources to matters that do not enhance safety. If the backfit rule is to have any meaning, therefore, the staff needs to avoid aggregating various unrelated changes together with one change that substantially contributes to safety since this too would preclude any meaningful backfit analysis. Thus, I recognize that there has to be a careful balance between avoiding separating integral parts and inappropriately aggregating unrelated parts. It is important that the merits of each component, irrespective of whether it is ultimately aggregated for purposes of the backfit analysis, are carefully explained and its cost is separately itemized. This will give our licensees and the interested public an opportunity to challenge the backfit analysis or to urge rejection of a specific change even if it passes the backfit test.

Finally, I agree with comments 1, 2, and 4 provided by Commissioner McGaffigan.